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IN THE

Supreme Court of the United States

October Term, 1969

No. 1589 Misc.

MANUEL ROLON,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

The petitioner seeks a writ of certiorari to review a judgment of the Court of Appeals of the State of New York entered on October 29, 1969 affirming a judgment of the Appellate Division, Second Department, entered on July 1, 1968, which unanimously affirmed a judgment of the Supreme Court of the State of New York, County of Kings, rendered on March 9, 1967. The judgment of the Court of Appeals, without opinion, is reported in 25 N.Y. 2nd 974 (1969).*

The decision of the Appellate Division, Second Department, without opinion, is reported in 30 A.D. 2nd 917.

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* Appendix A.

Jurisdiction

The jurisdiction of this court is invoked under 28 U.S.C., section 1257(3). It is contended that the petitioner's rights under the Fifth and Fourteenth Amendments were violated when he was sentenced as a "multiple felony offender on the basis of two previous felony convictions without affording him on sentence an opportunity to prove that the prior guilty pleas had been obtained as a result of coerced confessions." Respondent's reply is that petitioner's plea of guilty in a federal court in connection with his first conviction was not coerced but was his voluntary decision to proceed to trial despite his lawyer's conversations with him on three occasions in which his lawyer asked him whether he wished to go to trial and that petitioner is precluded from raising this issue after a voluntary plea of guilty. We will show, furthermore, that his claim of alleged fraud by a federal agent did not involve the plea itself but pertained to a collateral matter. Petitioner's plea of guilty in connection with his second conviction in a New York State court was not coerced on the alleged ground of police brutality, as is clearly obvious from petitioner's filing a writ of *coram nobis* after sentence in which he did not allege the ground of police brutality now set forth. Petitioner was represented by counsel in that case as well. It is further contended that the petitioner's rights under the Sixth and Fourteenth Amendments were violated by the trial court's refusal to relieve assigned counsel and designate another counsel. To this respondent replies that the contention is frivolous because the ground asserted by petitioner for his application was that his assigned counsel refused to make a motion for lack of prosecution, at a time when the case was already on the ready calendar of the court and the case was reached for trial within a period of two weeks.

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Statement of Case

Petitioner was convicted after a trial by jury in the Supreme Court of the State of New York, County of Kings, of assault in the second degree in four counts and was sentenced as a third felony offender to serve concurring prison terms of one and a half to ten years.

The trial adduced that on August 9, 1966 petitioner, after a five year separation from Isabel Arroyo, his common law wife, stabbed her and her mother, Lydia Arroyo, upon Isabel Arroyo's refusal to resume their relationship. Isabel Arroyo had to undergo an operation.

POINT I

Petitioner's two predicate pleas of guilty constituted a waiver of his allegations of underlying constitutional violations.

Petitioner was sentenced as a third felony offender. At sentence he challenged the constitutionality of the two underlying convictions: (1) a plea of guilty in 1961 in the Southern Federal District Court to the crime of forgery, for which he was sentenced to a term of one year and (2) a plea of guilty in 1963 in the Supreme Court of Kings County to the crime of attempted burglary in the third degree, for which he was sentenced to a term of three-and-a-half to ten years in Sing Sing Prison. It is petitioner's contention that he was entitled to a hearing on the constitutionality of these two prior felony convictions.

First, we discuss the federal conviction. In that case petitioner apparently made a confession to a "Spanish Secret Service Agent." (Minutes of Sentence of March

9, 1967, p. 19). It is his contention that it was exacted from him under false pretenses since the agent, knowing appellant was a drug addict, advised him that if he confessed, he would be sent to a hospital. It was because of this confession that he later pleaded guilty.

In petitioner's federal case he was represented by counsel as appears in the minutes of sentence (9).* The plea taken by him was after consultation with his lawyer. ". . . the fact that the petitioner was represented by counsel and acted after consultation with counsel is also to be given substantial weight in determining the issue of voluntariness of plea." *U.S. ex rel. Ross* v. *McMann,* 409 F. 2d 1016, 1021 (1969). His lawyer asked him if he wished to proceed to trial. It was petitioner himself, without any suggestion, urging or coercion on the part of his lawyer or anyone else, who adopted the position that he could not go to trial in view of his confession to the Secret Service agent (19). Petitioner told the sentencing court in the instant case with respect to that plea, the following:

> Defendant: I told my lawyer. He asked me through an interpreter, did you want to take this case to trial? Do you want to have an indictment because I never plead to an indictment? This was an information. That's what I plead to, an information. I say I can't go to trial with this case because I make a confession to the Spanish Secret Service Agent. If I go to trial with this, they will convict me. (19)

There is nothing in the record, aside from petitioner's bare-boned statement, which confirms his allegation of alleged "coercion" by the Spanish agent. For all that

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* The numerical reference in parentheses here and in the following pages is to the Minutes of Sentence of March 9, 1967, unless otherwise specified.

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appears, regardless of the truth of this allegation, petitioner may have been induced to plead guilty by the strength of the evidence against him. He says nothing of "what counsel advised him, what he and counsel knew and what evidence was available to the state." *U.S. ex rel. Ross* v. *McMann, supra,* at 1035 (dis. op. of Judge Lumbard). He supplies no reason for his failure to submit an affidavit from his then attorney as to what transpired on his plea of guilty.

The issue presented is governed in New York by the principle enunciated in *People* v. *Nicholson,* 11 N Y 2d 1067 (1962), which clearly precludes petitioner from raising it after a voluntary plea of guilty. The Court in the *Nicholson* case stated as follows:

> A defendant who has knowingly and voluntarily pleaded guilty may not thereafter attack the judgment of conviction entered thereon by coram nobis or other post-conviction remedy on the ground that he had been coerced into making a confession and that the existence of such coerced confession induced him to enter the plea of guilty. If a defendant desires to contest the voluntariness of his confession, he must do so by pleading not guilty and then raising the point upon the trial; he may not plead guilty and then, years later, at a time when the prosecution is perhaps unable to prove its case, assert this alleged constitutional violation. The issue as to whether the confession was illegally obtained is waived by the guilty plea.

In the *Nicholson* case, the defendant had alleged in his application for a writ of error coram nobis, "among other things, that a confession made by him on the day of his arrest was obtained through physical assault upon him,

psychological abuse, mental cruelty and illegal delay in arraigning him." 11 N Y 2d at 1068. Had the defendant in *Nicholson* proceeded to trial, some of these issues would have raised constitutional questions of due process. Although there is no disclosure of the reason or reasons for a denial of a writ of certiorari by the U. S. Supreme Court, the fact nevertheless is that a writ of certiorari to the Supreme Court in the *Nicholson* case was denied in 371 U.S. 929 (1962). The *Nicholson* principle was thereafter reaffirmed in the following cases: *People* v. *Dash,* 16 N Y 2d 493 (1965); *People* v. *De Flumer,* 16 N Y 2d 20 (1965); *People* v. *La Barth,* 19 N Y 2d 649 (1967).

A claim that a plea of guilty was "unconstitutionally coerced by the existence of a confession" was also raised in *U.S. ex rel. Glenn* v. *McMann,* 349 F. 2d 1018, 1019 (2d Cir., 1965). In a 2-1 decision, the court denied the writ of habeas corpus, stating: "A voluntary guilty plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings against him." *Ibid;* 1019. Again, the Supreme Court denied a writ of certiorari in 383 U.S. 915 (1966).*

The thrust of petitioner's argument is that the recent case of *U.S. ex rel. Ross* v. *McMann,* 409 F. 2d 1016 (2d Cir., 1969) (at present before the Supreme Court [No. 153, October 1969 Term]) in a 6-3 *en banc* decision has placed a gloss on the *Glenn* case, *supra,* that sharply delimits its applica-

* Mention should be made of the fact that the federal district court judge in the *McMann* case had denied the application "on the ground that appellant had failed to exhaust state remedies." *Ibid;* 1019. Regarding this issue the Circuit Court of Appeals said: "In this posture, it is unnecessary to decide whether the District Court erred in concluding that appellant failed to exhaust his state remedies." *Ibid.*

bility. According to this latest pronouncement by the Circuit Court of Appeals of the Second Circuit a distinction must be made between a mere allegation of a coerced confession without any specificity—"particularized allegations" (*ibid*, 1022) is the phrase used by the Court—which "is not sufficient to raise the issue of the voluntariness of a guilty plea," and an allegation of an unconstitutionally coerced confession with some specificity which is sufficient to raise the issue on a writ of habeas corpus. *Ibid;* 1019-20. This represents a new departure which, it is respectfully submitted, is not binding on state courts until and unless sanctioned by the United States Supreme Court. The trenchant dissents in the *Ross* case are sufficiently cogent in their arguments to raise a doubt regarding the ultimate decision by the U. S. Supreme Court.

In addition, the facts in this case are sharply distinguishable from those in the *Ross* case, *supra,* and even if, *arguendo,* the *Ross* doctrine should become the prevailing law, it would be inapplicable here. In the *Ross* case, one of the two petitioners, Wilbert Ross, alleged that he pleaded guilty "because his attorney had refused to attempt to suppress a confession which had been illegally obtained from him and had warned him that if he risked a trial, the confession and other evidence against him would surely lead to his conviction for first degree murder and sentence to the electric chair." *Ibid,* 1018. No such pressure or any pressure from whatsoever source is alleged by petitioner. He stated on sentence, as heretofore quoted, that it was his own decision to plead guilty after he had made a confession to a Spanish Secret Service agent. His counsel had asked him if he wished to proceed

to trial. "On *three occasions* he asked me the same questions which I repeat to him. I don't want to go—I made this confession and with the confession I would be convicted" (Emphasis supplied) (19-20). Obviously, his lawyer was ready and willing to proceed to trial. It was his unprompted voluntary reply that he could not go to trial because based on his confession a conviction would inevitably follow. Evidently, he was of the belief that he would be unable to convince a judge or a jury of the alleged coercion practiced upon him. In what way has the situation changed that he feels now that he can convince a judge of the "injustice" perpetrated upon him? In addition, unlike the *Ross* case, the alleged fraud by the federal agent did not involve the plea of guilty itself, as it did not deal with the plea of guilty, but was an alleged antecedent fraud regarding a matter collateral to the plea of guilty.

Likewise, the other petitioner in the *Ross* case, Foster Dash, contended that a false confession had been obtained from him after indictment in violation of his right to counsel, "and that his plea of guilty was induced by advice of counsel that the confession would negate any chance of acquittal and by a threat by the trial judge that he would receive the maximum possible sentence if he went to trial and was found guilty." 400 F. 2d at 1023. The distinctions made between the case of the other petitioner, Wilbert Ross, and the instant case are fully applicable to the case of Foster Dash.

Incidentally, the cases cited by appellant in which hearings were granted by Circuit Courts of Appeals on the issue whether a coerced confession induced a plea of guilty —in some of which the petitioner had apparently pleaded

guilty without the advice of counsel, as in *U.S. ex rel. Collins* v. *Maroney,** 382 F. 2d 547 (3d Cir.; 1967) and *Doran* v. *Wilson,** 369 F. 2d 505 (9th Cir.; 1966), and in the others where appellant had an attorney—*Smith* v. *Wainwright,* 373 F. 2d 506 (5th Cir.; 1967); *Carpenter* v. *Wainwright,* 372 F. 2d 1940 (5th Cir.; 1967) and *Shelton* v. *U.S.,* 292 F. 2d 346 (7th Cir.; 1961), cert. den. 369 U.S. 877 (1962)—a mere glance at the cases will show aggravated circumstances such as are not present in any degree in this case.**

In this case, even more than in the *Ross* case—since, as already indicated above, the facts of the clear nature of the voluntariness of the confession are pellucid and thus altogether different from the *Ross* case—we believe that "the issue is not whether appellant and others like him should be denied rights accorded them under the due process clause, which all would agree they should not, but whether, after having made a bargain recommended by competent counsel with full knowledge of the facts and

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* The Court's opinion makes no reference to an attorney and it is to be assumed that appellant had none.

** In *Smith* v. *Wainwright,* petitioner claimed that the police threatened to pull the trigger of a gun unless he confessed and, further, that his court-appointed attorney spoke to him for only 15 minutes on the eve of trial when his attorney advised the plea of guilty. In *Carpenter* v. *Wainwright,* petitioner claimed the police threatened him with a "fatal accident", they denied his request to see a lawyer; he was punched in the testicles and vomited, and later his court-appointed attorney said he did not believe the confession was coerced. In *Shelton* v. *U.S.,* petitioner's attorney advised the plea after a motion to suppress the evidence had been made and told him the court promised a sentence of no longer than ten years if he would plead guilty; in fact he received a sentence up to 16 years.

the consequences,* they should now be permitted to repudiate it on grounds whose availability was then well known to them, at a time when the state is unable effectively to controvert either their claims of illegality or prove their guilt. Any morality in this position altogether eludes me." 409 F. 2d at 1041-42 (dis. op.).

Finally, with regard to petitioner's challenge of his previous plea of guilty in the Supreme Court of Kings County in 1963 to attempted burglary in the third degree and his contention of police brutality as the inducing factor for the plea, the minutes of sentence show that he was represented by counsel on this plea (25, 27). Thereafter, he filed a writ of *coram nobis* before the Supreme Court judge who had imposed sentence upon him, and the writ was denied. In that writ he did not allege the ground—police brutality—now set forth as entitling him to a hearing for a violation of his constitutional rights (29-30). He raised an issue of double jeopardy, contending, in his own words, that the "burglary was reduced in a hearing in Felony Court to petit larceny, unlawful entry. I was waiting to appear to plead to the misdemeanor." (29). The very lame excuse offered by his attorney on sentence in this case for not raising in the *coram nobis* proceeding the obvious issue of police brutality, if it had occurred, was that at that time "he wasn't as learned in the law as he is presently now after he has done his research" (30). This contention is too transparently an afterthought by petitioner.

It is respectfully submitted petitioner has not established that he is entitled to any relief in this Court for an alleged violation of due process of law.

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* The instant case is stronger because it was petitioner himself who insisted on pleading guilty.

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POINT II

Appellant was not denied counsel of his own choosing.

Petitioner contends that his motion to relieve Legal Aid as his counsel and for the assignment of new counsel should have been granted. On January 23, 1967 when the case appeared on the Supreme Court calendar, defense counsel asked for an immediate trial. The Court informed him that the case would be reached in regular order as soon as the cases of an earlier vintage had been disposed of. Petitioner himself joined in the discussion and insisted that his lawyer submit a motion in writing to the Court for an immediate trial. The Court informed petitioner that the case was marked ready but that the impossible could not be done by jumping this case over earlier cases. After a discussion between petitioner and his lawyer, the latter informed the Court that he had reached an impasse with petitioner and was asking to be relieved. In response to the Court's question whether he had any money to hire his own lawyer, petitioner replied in the negative. The following colloquy then ensued between the Court and petitioner:

> The Defendant: The reason I ask my lawyer to withdraw himself from the case was because I did ask this Court for him to make a motion in my behalf for lack of prosecution. He say he don't go to make the motion. This is my understanding, that as my attorney he have to do it.
>
> The Court: Your attorney does not have to do anything. Your attorney is entitled to exercise his best judgment in the case and, to my mind, his best judgment is the proper judgment. Your motion to dismiss as I have indicated to you, would be a futile motion.

While you are entitled to an immediate trial, so is every other defendant and you can only get your immediate trial without depriving other defendants of their right to an immediate trial and I think that your attorney's advice in this case is the proper advice. And it is because of futile motions such as you want him to make that defendants like you cannot get the immediate trial that you want to get because you are taking up the time of the court with motions that have to be heard and have to be denied.

Now, because you do not like the advice of your attorney is no reason why he should be relieved as your attorney. Now we have a contract in the City of New York with the Legal Aid Society who is representing indigent defendants, of which you are one, is that correct?

The Defendant: Yes.

The Court: Now, because you do not like the advice that the Legal Aid Society gives you is no reason why the Legal Aid Society should be relieved and another attorney substituted in his behalf. So, I am not going to permit the Legal Aid Society—

The Defendant: Your Honor, I do believe that advice is advice, but when it comes to do his job which he was assigned to do so by the court, I do believe he must comply with them.

The Court: According to his best judgment. And his best judgment is that a motion such as you want him to make would be a futile motion.

The Defendant: Why can't he do it? He told me he can't do the motion.

The Court: He can do it—you can do it, Mr. Blatt.

The Defendant: He told me he no going to do the motion.

The Court: He told you he is not going to because it is a futile motion, is that right, Mr. Blatt?

Mr. Blatt: Yes.

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The Court: Along the lines I am indicating. I am not going to relieve him. You are free to hire another lawyer if you wish.

The defendant: I would if I could.

The Court: All right. (Minutes of 1/23/67, pp. 8-10).

The law is clear that "as long as assigned counsel are men of ability and integrity, the discretion and responsibility for their selection rest with the court, to be exercised free of outside interference." *People* v. *Brabson,* 9 N Y 2d 173 (1961). The dispositive issue of the *Brabson* case as stated by the Court was "whether the prerogative as to the choice of assigned counsel rests ultimately with the court or with the indigent defendant". *Ibid.,* 180. This question the Court answered in a categorical manner: The prerogative as to the choice of assigned counsel rests ultimately with the Court. The futility as well as unreasonableness of appellant's action is apparent from the fact that this case was reached and moved for trial on February 8, a little more than two weeks after the above exchange among the Court, defense counsel and petitioner. It is respectfully submitted that petitioner's contention is wholly baseless and he was accorded as speedy a trial as possible.

CONCLUSION

The petition for the writ of certiorari should be denied.

Dated: Brooklyn, New York
April, 1970

Respectfully submitted,

EUGENE GOLD
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J. MITCHELL ROSENBERG
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APPENDIX A

Judgment of Affirmance of Court of Appeals

COURT OF APPEALS OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—v.—

MANUEL ROLON,

Appellant.

APPEAL, by permission of the Chief Judge of the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 1, 1968, affirming a judgment of the Supreme Court (John R. Starkey *J.*) rendered in Kings County, which following a verdict convicting defendant of four counts of assault in the second degree, sentenced him, as a third felony offender, to serve a term of imprisonment of 3½ to 10 years on each count, the terms to run concurrently. In May, 1961, in the United States District Court for the Southern District of New York, defendant had been convicted of forgery upon his plea of guilty, and sentenced to a one-year term. In January, 1963, in the Supreme Court, Kings County, he had been convicted, upon his plea of guilty, of the crime of attempted burglary in the third degree, and sentenced to a 3½- to 10-year term. When he appeared for sentencing upon the present assault conviction, and following the reading of a multiple offender information based upon the 1961 and 1963 convictions, he challenged the constitutionality of both convictions, alleging (1) as to the 1961 conviction, that at the time of his arraignment before a United States Commis-

sioner, he could not speak or understand English, was not assigned an interpreter or counsel, was not advised of his right to counsel, and, as a result, was unaware of his right to a hearing at that time; that there was an unnecessary period of delay between his arrest and arraignment, during which a confession was elicited from him under false pretenses and without advising him of his rights, and that he had entered his plea of guilty only because of having made the confession, and (2) as to the 1963 confession, that he had entered his plea of guilty because of a confession which he had made after being beaten by the police and because of a promise, made by the prosecutor and/or the Trial Judge, that he would receive a maximum term of five years. In the Court of Appeals defendant argued that his constitutional rights were violated by the failure of the court which sentenced him as a third felony offender to afford him an opportunity to prove that his two prior guilty pleas were the result of coerced confessions extracted from him in violation of his constitutional rights; that said court also erred in denying him a hearing on his allegation as to a broken sentence-promise in connection with his 1963 conviction, and that he was deprived of his constitutional right to counsel by the refusal of the trial court to grant a pretrial request by him for assignment of new counsel, made upon the ground that his assigned counsel had refused to comply with his request to make a motion to dismiss the indictment for failure to prosecute.

Gerald Zuckerman for appellant.

Eugene Gold, District Attorney (J. Mitchell Rosenberg of counsel), for respondent.

Judgment affirmed; no opinion.

Concur: Chief Judge Fuld and Judges Burke, Scileppi, Bergan, Breitel, Jasen and Gibson.

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